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IN THE

Supreme Court of the United States

No. 934

GUNDAKER CENTRAL MOTORS, INC., a body corporate of the State of New Jersey,

Appellant,

v.

FREDERICK J. GASSERT, Jr., Director of Division of Motor Vehicles of the State of New Jersey,

Appellee,

and

BOROUGH OF BELMAR, a municipal corporation of the County of Monmouth,

Defendant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

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FREDERICK J. GASSERT, JR., Director of Division of Motor Vehicles of the State of New Jersey,

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and

BOROUGH OF BELMAR, a municipal corporation of the County of Monmouth,

Defendant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of the State of New Jersey entered on the 17th day of December, 1956, in which it was provided, however, that no mandate should issue for 10 days thereafter, or until December 27, 1956, reversing and setting aside a judgment of the Superior Court of New Jersey, Law Division, Monmouth County; and appellant submits this Statement to

show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below.

The opinion of the Supreme Court of New Jersey is reported in 23 N. J. 71 (1956).

The opinion of the Superior Court of the State of New Jersey was not reported in any official report.

Both opinions are attached hereto as Appendix A-1 and A-2 respectively, and there is also appended a copy of the judgment of the Supreme Court of the State of New Jersey which is attached hereto as Appendix A-3.

Jurisdiction.

The suit in the Superior Court of New Jersey was brought to test the constitutionality of a statute (P. L. 1955 Chapter 254, p. 936, N. J. S. 2A:171-1.1, 2A:171-1.2), and notice of appeal was filed in the office of the Clerk of the Superior Court of New Jersey January 7, 1957 (Rule 10, Para. 3).

The New Jersey statute under attack provides that any automobile agent who sold or endeavored to sell an automobile on Sunday is liable to fine or imprisonment, and in addition thereto may have his license revoked by the Director of the Division of Motor Vehicles upon conviction for said offense. The New Jersey Supreme Court upheld the validity and constitutionality of this statute under the Federal Constitution. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on

direct appeal in this case: *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Largent* v. *Texas*, 318 U. S. 418; *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. 767; *LaCrosse Tel. Corp.* v. *Wisconsin Board*, 336 U. S. 18; Stern & Gressman "Supreme Court Practice," Second Edition, pp. 56, 57.

Questions Presented.

1. Chapter 254 of the Laws of 1955 of the State of New Jersey (N. J. S. 2A:171-1.1), which provides that any person who shall engage in the business of buying, selling or trading in new or used motor vehicles on Sunday, or who shall attempt any such activity on Sunday, shall be subject to fine or imprisonment, or both, and which also provides that if such person is a licensed automobile dealer, he shall be subject to suspension or revocation of his license, violates the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution, and also violates the same Amendment in denying to the appellant the equal protection of the laws.

2. Appellant claims that the statute in question is an abuse of and is in excess of the police powers of the State, and that the said legislation bears no relation to the public health, welfare, morals or safety, and that consequently, the sale of automobiles being a lawful business and not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever; and that the dominant purpose of the legislation was the service of private interests under the guise of a police regulation for the preservation of health and safety.

3. Appellant claims that the statute under attack constitutes a deprivation of appellant's property in contra-

vention of the due process clauses of the Fourteenth Amendment of the Federal Constitution, by creating an illusory classification,—namely, automobile agencies which are required to be closed on Sundays,—and excluding from its provisions business activities which are similar in character to those prohibited by the statute,—thus resulting in arbitrary discrimination against the appellant.

Statutes Involved.

Chapter 254 Laws of New Jersey 1955, N. J. S. 2A:171-1.1, which is set forth in Appendix B-1; Chapter 253 Laws of New Jersey 1955, R. S. 39:10-20, which is set forth in Appendix B-2.

Statement.

In the original complaint (Para. 13) filed by the appellant in the Superior Court of New Jersey, appellant charged that the statute under attack violated the Fourteenth Amendment of the Constitution of the United States (*Gundaker Central Motors, Inc.* v. *Gassert,* Superior Court of New Jersey, L-4423-55-PW).

Appellant owns and operates an automobile agency in Belmar, New Jersey, where for many years it has been engaged in the sale of Plymouth and DeSoto automobiles, and conducted its business on Sundays as well as the other days in the week. Upon the enactment of the statute forbidding the conduct of its business on Sundays, appellant instituted its suit in the Superior Court of New Jersey to test the constitutionality of the legislation. The action was filed in lieu of a prerogative writ,—such writs having been abolished in New Jersey upon the adoption of the Constitution of 1947. The Director of the Division of Motor Vehicles

of the State was made a defendant because the legislation vested in him the power to revoke the license. The Borough of Belmar was also made a party to the suit, but took no active part in the proceeding. The Attorney General of the State appeared for the defendant, Director of the Division of Motor Vehicles, and the case was tried before the court without a jury.

Uncontradicted evidence was adduced on the part of the appellant showing that throughout the area one might buy automobile accessories and outboard motors; that hardware stores operated; that boatyards operated at which marine equipment and supplies and boats of all kinds and description were displayed and sold; that real estate offices offering properties for rent or sale operated; that one might buy fishing tackle, guns and ammunition, and merchandise of almost every description. Specific examples were cited showing instances in which an automobile agency was closed on Sunday, but immediately adjoining, an agency for the sale of motor boats operated all day.

Evidence was introduced that an association in New Jersey known as New Jersey Automotive Trade Association had canvassed its members to determine whether they preferred to be open or closed on Sundays. Most of them preferred to be closed. Thereupon, the Association had its own counsel draft a bill providing for the closing of the agencies Sundays, which bill was later enacted into law. All of this appears in the opinion filed in the Superior Court appended hereto and marked Appendix A-2. The Court found that the statute "had its origin in the New Jersey State Automotive Association; that its primary purpose was to control competition on Sundays, particularly from automobile dealers along the shore area in the State"; the Court referred specifically to the guaranties provided by the Fourteenth Amendment of the Federal Constitu-

tion, and held that the statute "Was not enacted to protect a basic interest of society such as the general health, safety, morals or welfare of the people, but rather that it had an economic base and was born of an unholy alliance between the New Jersey State Automotive Trade Association, which acted as its Godfather, and the Legislature, and had as its predominant purpose a measure of control of competition in the sale of new and second-hand automobiles in this State."

The Court further found that there was no logical reason for singling out automobile sales agencies from among the dozens of businesses operating on Sunday; and the Court found that there was nothing connected with the keeping open of automobile sales rooms that might fairly and reasonably constitute danger to public health, morals, safety and welfare. The Court took judicial notice of the fact that for many years past, business in general had been carried on freely in New Jersey on Sunday, and held that the classification attempted to be created by the statute was illusory and denied to plaintiff and other automobile dealers similarly situated, the equal protection of the laws guaranteed by both the State and Federal Constitutions.

The statute was set aside as an unconstitutional invasion of personal and property rights.

The Director of Division of Motor Vehicles appealed to the Appellate Division of the Superior Court, contending that the statute was constitutional and that it did not create in illusory classification, but a genuine classification. The case was certified to the Supreme Court of New Jersey upon the Court's own motion.

In its opinion (Appendix A-1), the Court referred to evidence by the defendant Director "that the traffic hazard on Sunday by these businesses being open during the heavy traffic on Sunday afternoons presents a reasonable basis

for regulation." In another case involving the same statute (*Haber* v. *Gassert*, A-670-55), which was consolidated with the appellant's case, some evidence had been adduced that in northern New Jersey at one or two agencies traffic was affected along the highways. However, in appellant's case, as an examination of the record will disclose, no evidence whatsoever of any such condition was offered, and the record is devoid of any such claim. Moreover, *Haber* v. *Gassert, supra,* is not before this Court on appeal.

The Supreme Court of New Jersey held that the classification was not violative of the due process clause and that the class selected for regulation satisfied the mandates of the State and Federal Constitutions. The Court held that the public policy of New Jersey is against all worldly employment on Sunday, except works of charity and necessity.

In its opinion, the Court referred to its own decision in *State* v. *Fairlawn Service Center, Inc.*, 20 N. J. 468 (1956) in which it was held that N. J. S. 2A-171-1 was "of no force and effect," because the statute had no penalty. The statute here under attack is merely a supplement to N. J. S. 2A-171-1, and appellant argued that it could have no more force than the statute which it supplemented. However, the Supreme Court, in its opinion, declared that the statute (N. J. S. 2A-171-1) "remains declarative of the general public policy of the State with respect to Sunday closing."

The trial judge, in his opinion (Appendix A-2), put the question as follows:

> "How a statute which is 'of no force and effect' can still be law is not clear to me, and I cannot concede the soundness of defendant's contention in this respect."

At that stage of the proceeding, the defendant was the Director of the Division of Motor Vehicles. The trial Court

stated the law correctly, and the Supreme Court erred in holding that while the statute was a nullity in reality, it still could declare the public policy of the State.

The Court reversed the decision of the Superior Court and dismissed the complaint.

The Questions are Substantial.

The principal question before the Court in the instant case has not been decided in this Court. It is whether a statute forbidding the sale of automobiles on Sunday without attempting to legislate as to sales of any other character whatever in the State, is violative of the Fourteenth Amendment. This prohibition, moreover, is emphasized in the most striking manner by the evidence in the instant case that sales of all other commodities without restriction are permitted in New Jersey. We may immediately be confronted with the decision of the Court in *Zucht* v. *King*, 260 U. S. 174; 67 L. Ed. 195, in which the Court declined jurisdiction on the ground that the question presented was not substantial. That was a case in which an ordinance of the City of San Antonio, Texas, provided that no person should attend the public school without having first presented a certificate of vaccination. It will immediately be observed, however, that the Court's opinion was grounded upon the fact that a State might, consistently with the Federal Constitution, delegate to a municipal authority the power to determine under what conditions health regulations should become operative; and it also held that a broad discretion vested in officials affecting the application and enforcement of a health law.

The rationale of the *Zucht* case was that under the police power of the State, legislation might be enacted where the

public health, welfare, safety or morals were affected, and that such legislation was consistent with the Fourteenth Amendment to the Federal Constitution. In the instant case, there is nothing whatever by which it might be claimed that the sale of an automobile on Sunday *per se* affects the public health, welfare, safety or morals. In every case in which such legislation has been upheld, it has fallen into one of these four categories. Hence, the assertion by the appellant that this Court has not had before it the question of the right to forbid the conduct of a business on Sunday, which is not attended with any of the characteristics which would bring it within the police power of the State, *i. e.*, it has no effect upon the public health, welfare, morals or safety.

Much of the legislation having to do with closing of businesses on Sunday springs from the intention of the Legislatures to maintain the sanctity of the Sabbath and not to permit unnecessary business activities on that day of the week. It could not be said that the statute here under attack was grounded upon any such principle. If the State of New Jersey intended to return to a policy of strict religious observance of the Sabbath, it would forbid all business activity with the exception of those businesses which are widely held to be necessitous,—such as drug stores, restaurants for the sale of food, gasoline stations for the motorists, and similar activities. The religious observance of the Sabbath is not protected when a legislature forbids the sale of an automobile, but permits the sale of a house, clothing, lumber, motor boats, antiques and all the other commodities against which no prohibition as to Sunday operation is levelled in New Jersey. The statement annexed to this law when it was introduced in the Legislature recited that the purpose of the bill was to provide for "a more effective observance of Sabbath days." (See

opinion in Supreme Court, Appendix A-2.) But instead of legislating generally against all business, the Legislature singled out one type of business enterprise, making manifest the arbitrary and discriminatory nature of this piece of legislation.

The determination of the question before the Court is a matter of general and probably nationwide importance. In Colorado in the case of *Mosco* v. *Duke W. Dunbar, Attorney General,* the Supreme Court of Colorado declared unconstitutional a statute prohibiting the sale of motor vehicles on Sunday. The case was Docket No. 17779 in the Office of the Clerk of the Supreme Court. The case has not been printed in any official report for the reason that a petition for rehearing was filed. On April 1, 1957, the Court reversed itself by a four to three decision, holding that the statute in question is constitutional. In the interval between the decision of August, 1956 and the decision of April 1, 1957, the New Jersey Supreme Court had decided the instant case, and the writer believes it to be a fact that the reversal in Colorado was based in great part upon the New Jersey decision. Another petition for rehearing has now been filed in the Colorado case.

In New Jersey, bills have been introduced in the Legislature since the decision in the instant case affecting Sunday closings on a wider and broader scale. There is, of course, a group of opinions tending toward liberality and a group tending toward strict observance. It is very important that the question whether or not a statute singling out one particular form of business, which business does not affect the morals, health, welfare or safety of the people, can be justified (a) as a means of preserving religious observance of the Sabbath; or (b) under the police power of the State. Can such a statute be justified even though it discriminates against one type of business while

leaving other businesses with similar characteristics unhindered in their operations? In the constantly changing mode of conducting business in America,—with the advent of the highway stores and markets and their impact upon established businesses within city limits, with the rivalry between the city-operated enterprises, which are more likely to be closed on Sunday because the potential customers are on the highways in their automobiles,—and the highway enterprises operating freely on Sunday, and with the efforts of one group to bring about legislation by the State or local ordinances to prohibit the practice, it is highly important that the road for the future be indicated, and that the Court determine whether one business may be singled out or whether such legislation must be of a comprehensive nature, embracing all businesses which have similar characteristics. Moreover, it should be observed that "similar characteristics" is not synonymous with "identical characteristics."

The Supreme Court of New Jersey held that classifying automobile agencies created no ground for complaint "if there is any reasonable basis for such action." But the question is whether the classification is real or illusory. If the characteristics of one business are similar to those of another business, then to legislate against one and leave the other unharmed, is arbitrary and creates an illusory classification. Nowhere has this principle been more lucidly enunciated than in the opinion of the late Chief Justice Beasley in *Van Riper* v. *Parsons*, 40 N. J. L. 1 (1878).

In its opinion, the New Jersey Court relied upon *Guill* v. *Mayor and Council of Hoboken*, 21 N. J. 574, 582 (1956), but in that case, the Court laid down the principle that "arbitrary selection can never be justified by terming it 'classification.'"

This Court has held time and again that a right secured by the national Constitution cannot be overthrown nor disregarded because it is claimed that the action is taken under the police power of a state. *Reid* v. *Colorado,* 187 U. S. 137; 47 L. Ed. 108; *Panhandle Eastern Pipeline Co.* v. *State Commission,* 294 U. S. 613; 79 L. Ed. 1090; *Walling* v. *Michigan,* 116 U. S. 446; 29 L. Ed. 691; *Lochner* v. *N. Y.,* 198 U. S. 56, 49 L. Ed. 941.

The principle that regulation of occupations otherwise lawful must be done in furtherance of the protection of the health, safety, morals or general welfare of the State is laid down in 11 Amer. Juris. 1047, Section 285, as follows:

> "Regulation of occupations cannot be valid where it amounts to an arbitrary or unwarranted interference with the right of the citizen to pursue any lawful business. It is dependent upon a reasonable necessity for its exercise to protect the health, safety, morals, or general welfare of the state, and unless an act restricting the ordinary occupations of life can be shown to fall within these objects of the police power, the act is void. If a lawful business is of a beneficial character, and not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever."

And in the same work in the Treatise on Constitutional Law, 12 Amer. Juris. 155, there appears the following:

> "Another oft-quoted group of canons is to the effect that the reason for a classification must inhere in the subject matter, must be natural and substantial, and must be one suggested by necessity due to such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them. It is only when such distinctions exist that differentiate in important particular

> persons or classes of persons from the body of the people that laws having operation only upon such particular persons or classes of persons are upheld as valid enactments."

It has been shown that testimony was adduced at the trial proving that the New Jersey Automotive Trade Association was instrumental in having the law enacted. Three witnesses who were members of the Association testified to this effect, and two of them were officials of the Association.

The trial court grounded its opinion upon the conclusion that the statute "was not enacted to protect a basic interest of society such as the general health, safety, morals or welfare of the people, but that rather it had an economic base." (See Appendix A-2.)

Broad as it is, the police power is not without its limitations. Its exercise must be directed to a legitimate need, i.e., the protection of a basic interest of society rather than the mere advantage of particular individuals. *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413. And it is requisite that the means employed in its exercise have a rational relation to that end and be altogether free from arbitrariness.

In the instant case, under the guise of a police regulation and for the better observance of the Sabbath, rights of property have been invaded when it is manifest that such was not the object and purpose of the regulation.

It is submitted that:

(1) The decision of the New Jersey Supreme Court put its stamp of approval upon what was clearly an illusory classification.

(2) There is no relationship between the statute under attack and the proper exercise of the police power of the State.

(3) The due process and equal protection clauses of the Fourteenth Amendment have been violated by the statute under attack.

(4) Appellant believes that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Asbury Park, New Jersey.

Appendix A-1.

Opinion of Supreme Court.

SUPREME COURT OF NEW JERSEY,

No. A-38, September Term, 1956.

Gundaker Central Motors, Inc.,
Plaintiff-Respondent,

v.

Frederick J. Gassert, Jr., Director of Division of Motor Vehicles, etc.,
Defendant-Appellant,

and

Borough of Belmar, etc.,
Defendant.

(Monmouth County Action)

Jerome D. Haber, trading as Ajax Motors, and John Slaman, trading as Capitol Auto Sales,
Plaintiffs-Respondents,

v.

Frederick J. Gassert, Jr., individually and as Director, Division of Motor Vehicles, etc.,
Defendant-Appellant,

and

Angelo De Rose, etc., *et als.*,
Defendants.

(Bergen County Action)

Argued November 13, 1956, November 19, 1956 and December 10, 1956; decided

Appendix A-1.

On certification from the Appellate Division.

Mr. JOHN F. CRANE, Deputy Attorney General, argued the cause for the appellant, FREDERICK J. GASSERT, JR., Director of Division of Motor Vehicles (Mr. GROVER C. RICHMAN, JR., Attorney General of New Jersey, attorney).

Mr. ALBERT S. GROSS argued the cause for the respondents, JEROME HABER and JOHN SLAMAN (Mr. NELSON G. GROSS, on the brief).

Mr. WARD KREMER argued the cause for the respondent Gundaker Central Motors, Inc.

The opinion of the Court was delivered by VANDERBILT, C. J.

This is a consolidated appeal from judgments of the Law and Chancery Divisions of the Superior Court holding unconstitutional statutes that require used car dealers to close on Sunday and providing penalties for failure to do so. We certified the matter on our own motion pursuant to R. R. 1:10-1(a) because it is concerned with the constitutionality of statutes dealing with an important matter of public policy and further because it indicates some serious misconceptions as to the effect of our decision in *State* v. *Fair Lawn Service Center,* 20 N. J. 468 (1956).

The question here raised is whether a law which singles out automobile dealers and prohibits their business operations on Sunday is a constitutional exercise of power by the State.

The action in the *Gundaker* case was by suit in lieu of the prerogative writ of Certiorari in the Law Division, Monmouth County, attacking the constitutionality of Chapter 254 of the Laws of 1955 (approved December 28, 1955). The action in the *Haber* case was commenced in the Chancery Division, Bergen County, seeking a declaration of the

unconstitutionality of not only Chapter 254 of the Laws of 1955, but all of Chapter 253 as well.

Chapter 254 of the Laws of 1955 (N. J. S. 2A:171-1.1 et seq.) in essence prohibits dealing in new or used cars on Sunday and holds that persons who do so in violation of the act are disorderly persons and subject to a fine or imprisonment or both. It also provides for an additional penalty by way of suspension or revocation of the car dealer's license to engage in that business required by Chapter 10 of Title 39 of the Revised Statutes. This statute was enacted as an entirely new provision and a supplement to Chapter 171 of Title 2A of the New Jersey Statutes.

R. S. 39:10-20, prior to its amendment by Chapter 253 of the Laws of 1955, provided for the suspension and revocation of a car dealer's license after hearing for certain violations of the law and misconduct. The new act merely amended the statute by including in the causes for suspension or revocation "final conviction of the licensee for violating any provisions of Chapter 171 of Title 2A or of any supplement thereof (Observance of Sabbath Days)."

The facts in both cases are not substantially in dispute.

The plaintiff in the *Gundaker* case is engaged in the operation of a new and used automobile business in Belmar, Monmouth County. It had been its practice for many years to keep open on Sunday and to conduct business on that day just as on any other day in the week. Sunday was its biggest business day; the plaintiff claims that it sold more cars on that day than it sold on any other single day of the week and will now be caused to lose substantial revenues. In keeping open on Sunday, it was no different than many other businesses in the communities surrounding Belmar. Real estate offices, 5 and 10 cent stores, antique shops and motor boat agencies all keep their doors open for "business as usual" on Sunday.

Just prior to the enactment of the statutes in question here, competitive conditions in the automobile sales business were causing many dealers to remain open on Sundays

as a matter of self-preservation to obtain a share of the available trade. These places of business were generally open 12 to 13 hours a day during the week and 8 to 9 hours a day on weekends. Hours of work of the sales personnel engaged by these dealers ranged from 60 to 77 hours per week, and the prevalence of a commission system of compensation for these salesmen tended to cause them to work long hours without adequate time off for recreational purposes.

It also appears that of the approximate 1100 automobile dealers selling new and used cars in this state, about 900 of them are members of the New Jersey State Automotive Trade Association. In the fall of 1954, evidently for the purpose of alleviating existing conditions in the industry, this group caused a poll to be taken of its members on the subject of Sunday closing. The ballots received from 80.3% of the members showed overwhelmingly that the group were in favor of Sunday closing; 77.4% of those voicing their opinion voted in favor of it. Based upon this expression by its members, the Association had its counsel draft a bill providing for closing of automobile agencies on Sunday. Whether this bill was enacted in the form suggested, without amendment, does not definitely appear, but the court below found that the bill was enacted into law.

After the enactment of the statutes here in issue, the plaintiff received a notice from the Belmar Police Department that it would have to close on Sunday according to the direction of the law. Gundaker has complied with the law ever since and brought this action to test the constitutional propriety of the main enactment, L. 1955 c. 254.

After trial, the court below was of the opinion that the statute, L. 1955 c. 254, was unconstitutional, that it

> "was not enacted to protect a basic interest of society such as general health, safety, morals or welfare of the people, but rather . . . had as its predominant purpose a measure of control of competition in

> the sale of new and second-hand automobiles in this State."

and as such it said: "It constitutes a perversion of the police power and violates both the State and Federal Constitutions." The trial court saw nothing connected with the keeping open of automobile agencies on Sunday that could fairly be said to constitute a danger or hazard to public health, morals, safety or welfare sufficient to justify a separate classification for this type of endeavor and found the classification illusory and unreasonable and that the statute denied to the plaintiff and other automobile dealers equal protection of the laws guaranteed by our constitutions.

In the *Haber* case the plaintiffs are automobile dealers in South Hackensack and Little Ferry, Bergen County. Their complaint in substance is similar to that in the *Gundaker* suit except that in this suit the attack was levied at "all portions" of both laws. But unlike the other case it was disposed of on cross motions for summary judgment. In this case the Director of Motor Vehicles took the position that the traffic on state highways on Sundays, and here particularly Route 46 as it runs through Little Ferry and South Hackensack, N. J. between the hours of 12:00 noon and 10:00 p. m. was unusually heavy and that the activity of motorists driving off the highway to the places of business of these car dealers and then back on to the road again constituted a constant and serious traffic hazard and increased the risk of collision during this period.

The trial court, without opinion, undertook to declare unconstitutional in its entirety not only L. 1955 c. 254 but also L. 1955 c. 253, without considering whether the latter enactment might have had any validity and effect apart from any dependence upon the other act.

On this appeal the New Jersey Automotive Trade Association has been permitted to intervene as *amicus curiae* and has filed a brief supporting the position of the Director of the Division of Motor Vehicles and the other appellants here.

The Director of Motor Vehicles contends that these statutes represent a valid exercise of the prerogatives of the Legislature in the fields of public health, welfare and safety; that the long hours of work forced by the competitive conditions furnish a basis for regulation of this particular field of endeavor; *that the traffic hazard created by these businesses being open during the heavy traffic on Sunday afternoons presents a reasonable basis for regulation;* that the trial court attributed to the Legislature a motive in the enactment of these laws which was not apparent from the enactment and was based on elements that were in no way binding or conclusive in their indication of the true purpose of the Legislature; and that notwithstanding our decision in *State* v. *Fair Lawn Service Center, Inc.*, 20 N. J. 468 (1956) the statute remained effective as a declaration of the public policy of the state with regard to Sunday closing. He also urges that the statutes are not unconstitutional in a discriminatory sense because there is reasonable basis for legislating against the Sunday operations of these car dealers and no car dealers have been excluded from the operation of the statute; that by forcing the closing on Sunday of all persons engaged in the sale of new and used cars no person in that business in this state has been adversely affected from an economic standpoint; that no harm has been caused to the plaintiffs; and that, therefore, they have not been deprived of equal protection of the laws.

The principal position of the plaintiffs is that the mere fact that these statutes ban the sale of motor vehicles on Sunday without similarly banning the sale of all other goods, makes them discriminatory, unreasonable and violative of the federal and our state constitutions. They also assert that there is nothing in the activity here involved so affected with the public interest as to render it susceptible to the exercise of the state's police power. It is further argued that the statute was economic in nature and born of an "unholy alliance" between the Trade Association and the Legislature.

These are in no way novel contentions, nor is the applicable law unfamiliar.

The state has the power, in the interests of the common good, to enact all manner of laws reasonably designed for the protection of the public health, welfare, safety and morals. The exercise of the power may cause individual hardship or even limit the freedom of individual action; but so long as there is some degree of reasonable necessity to protect the legitimate interests of the public, and the regulation resulting from the use of the power is not arbitrary or oppressive, the greater good for the greater number must prevail and individual inconveniences must be suffered as the price to be paid for living in a well-ordered society, *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608 (1949) rehearing denied 336 U. S. 921, 93 L. Ed. 1983 (1949); *N. J. Good Humor, Inc.* v. *Bradley Beach*, 124 N. J. L. 162 (E. & A. 1939); *Reingold* v. *Harper*, 6 N. J. 182 (1951); *Schmidt* v. *Board of Adjustment, Newark*, 9 N. J. 405 (1952); cf. Stillman, "Police Power in New Jersey", 50 N. J. L. J. 205 (1927). Mr. Justice Holmes, in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062 (1911) mentions that this power

> "... may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to public welfare."

In *Kovacs* v. *Cooper, supra*, the Supreme Court of the United States (in affirming our former Court of Errors and Appeals which in turn affirmed our former Supreme Court, see 135 N. J. L. 64 and 584) said:

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of a community. A state or city may prohibit acts or things reasonably thought

to bring evil or harm to its people." 336 U. S. at p. 83.

But the police power may not be exercised so as to be repugnant to the fundamental constitutional rights guaranteed to all citizens, *Schmidt* v. *Board of Adjustment, Newark, supra,* 9 N. J. 405, 414 (1952). Significantly, Mr. Justice Harlan said in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 558, 46 L. Ed. 679, 689 (1902):

> "But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or Statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police power must yield to that law."

and again in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26, 49 L. Ed. 643, 649 (1904) that:

> "According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety . . . no rule prescribed by a state . . . shall contravene the Constitution of the United States nor infringe any right granted or secured by that instrument."

Accordingly, the constitutional guarantees of due process and equal protection are elements to be accounted for in the exercise of the state's police power; they are not elements that in any way limit the subjects over which the state may exercise its power, but elements which condition the exertion of that power by their fundamental demands. In *Schmidt* v. *Board of Adjustment, Newark, supra,* 9 N. J. 405, 414 (1952) we pointed out that:

> ". . . the guaranty of due process requires 'only that the law shall not be unreasonable, arbitrary, or

> capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.' *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934)."

Moreover, "equal protection of the laws", which demands that all persons similarly situated be dealt with alike, is accomplished by the avoidance of "arbitrary discrimination between persons similarly circumstanced," *id.* p. 418. Thus, legislation that treats all persons within a class reasonably selected for regulation in a like or even merely in a similar manner, satisfies the mandates of the state and federal constitutions, *Raymond* v. *Township of Teaneck*, 118 N. J. L. 109 (E. & A. 1937); *General Public Loan Corp.* v. *Director, Division of Taxation*, 13 N. J. 393 (1953); *Guill* v. *Mayor and Council of City of Hoboken*, 21 N. J. 574 (1956). In the *Guill* case, Mr. Justice Heher took the occasion to hold for a unanimous court that:

> ". . . the classification cannot be arbitrary or illusory, but must bear some just and reasonable connection with the primary object of the legislation; a particular classification is not repugnant to the Fourteenth Amendment merely because 'inequality actually results'; every classification of persons and things for regulation by law produces inequality in some degree; to vitiate the regulation the inequality must be 'actually and palpably unreasonable and arbitrary.' *Jamouneau* v. *Harner*, 16 N. J. 500, 520 (1954). See also *Van Riper* v. *Parsons*, 40 N. J. L. 1 (Sup. Ct. 1878); *State* v. *Guida*, 119 N. J. L. 464 (E. & A. 1938). It suffices if the classification have a rational and just relation either to the fulfillment of the essential legislative design or to some substantial consideration of policy or convenience bearing upon the common welfare.

• • • • • •

> "... Classification must itself be fair and impartial and not arbitrary or illusory, grounded in material distinctions and differences concerned with the central legislative policy; and it satisfies the constitutional standard if there be any conceivable state of facts affording a just ground for the action taken, a difference of degree having material relevancy to the police policy in view." p. 583.

While a measure grounded in the exercise of the police power must tend to accomplish the basic purpose of its enactment, a large measure of discretion is vested in the legislature to determine not only what regulations are necessary to protect the public good and welfare but also the appropriate means of accomplishing these ends. Its wisdom or the means selected are not subject to review or interference by the courts except in the protection of fundamental constitutional rights, II Cooley, *Constitutional Limitations,* (8th Ed.) 1228-1231; *Amodio* v. *Board of Commissioners of West New York,* 133 N. J. L. 220, 225 (Sup. Ct. 1945).

Consequently, it is the duty of this court to uphold legislation unless there is no room for doubt as to its violation of constitutional provisions, *Reingold* v. *Harper, supra,* 6 N. J. 182, 194 (1951); *Schmidt* v. *Board of Adjustment, Newark, supra,* 9 N. J. 405, 416 (1952); *Russo* v. *the Governor,* 22 N. J. 156, 170 (1956).

The statutes in question here apply to all automobile dealers within the state without distinction as to class, type, location or otherwise. All are required to close. Fundamentally then, they satisfy the initial inquiry as to equal protection. No economic advantage can be gained by anyone within this state by reason of the Sunday regulation because no persons other than those covered by the enactments can engage in the business of selling motor vehicles, *R. S.* 39:10-19. Thus, all motor vehicle dealers are protected in their businesses and no substantial loss of reve-

nues can result where the product they deal in is unobtainable elsewhere within the state. The cars that would be sold on Sunday will now be sold on the other days in the week and probably to the same prospective purchasers.

The fact that the sale of motor vehicles is singled out for legislative treatment is no ground for complaint if there is any reasonable basis for such action, *Washington National Insurance Co.* v. *Board of Review*, 1 N. J. 545 (1949); *Jamouneau* v. *Harner*, 16 N. J. 500 (1954), cert. denied 349 U. S. 904 (1955); *Guill* v. *Mayor and Council of Hoboken, supra*, 21 N. J. 583 (1956). And there is reasonable basis if the buying and selling of motor vehicles on Sunday has effects inimical to the public good and welfare. Under the police power "the State may protect its citizens from physical and moral debasement which comes from uninterrupted labor"; see *State* v. *Fair Lawn Service Center, Inc., supra*, 20 N. J. 468, 474, 483 (1956).

In the present state of Sunday activity in this automotive age, there are sections of our highways stretching for miles almost exclusively devoted to the sale of new and used cars, where the owners and employees, forced by the unreasonable and competitive lust of some of their neighbors in the trade, are compelled to maintain their business vigil every day of the week and for long hours; who can say that this is not inimical to the public good? Moreover, common human experience has shown to all who have had the occasion to drive on the highways of this state that even a single business enterprise can constitute an insidious accident hazard when the highway on which it is situated is full with super-powered automobiles. Multiply this one instance by the number of dealers that are found, let us say, in the Little Ferry-South Hackensack area and see what the potential havoc is, to say nothing of the peace and tranquillity that is incidentally disturbed.

The state has an absolute right to enter here and force on all and everyone so engaged regulations for the benefit of the public, and it is not for the court to say that its action

in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to public or social evils requiring similar legislation that are yet unregulated, *Raymond* v. *Township of Teaneck, supra,* 118 N. J. L. 109 (E. & A. 1937); *Hertz Washmobile System* v. *South Orange,* 41 N. J. Super. 110 (Law Div. 1956). As we have already indicated, the legislature has a wide range of discretion in the choice of the means and methods by which it shall enhance the public good and welfare, *Amodio* v. *Board of Commissioners of West New York, supra,* 133 N. J. L. 220, 225 (Sup. Ct. 1945).

While it is true that if the dominant purpose of the legislation be to serve private interests under the cloak of the general public good, the resulting legislation is a perversion and abuse of power and therefore unlawful, *Reingold* v. *Harper,* 6 N. J. 182, 192 (1951), the only real basis for the assertion of such a motive here is in the sponsorship of the legislation in question. But the motives of the sponsors cannot be imputed to the legislature unless there is basis for it in its statutory expression, *Keyport Steamboat Co.* v. *Farmers Transportation Co.,* 18 N. J. Eq. 13 (Ch. 1866), affd. 18 N. J. Eq. 511 (E. & A. 1866); *Soon Hing* v. *Crowley,* 113 U. S. 703, 710, 28 L. Ed. 1145 (1885); 2 Sutherland, *Statutory Construction* (3rd Ed.) Sect. 5014. We find no legal basis for attributing any desire on the part of the legislature to act other than in the general public interest.

The plaintiff, Gundaker, urges that our decision in *State* v. *Fair Lawn Service Center, Inc., supra,* 20 N. J. 468 (1956), is dispositive of the present case. It contends that since we held N. J. S. 2A:171-1 was "of no force and effect" without a penalty clause, *id.* 473, that statute has been "swept away by the decision in the *Fair Lawn* case"; and that since the present Chapter 254, Laws of 1955 is expressly nothing more than a supplement to the statute there involved it can have no more vitality than the original Chapter 171. Its argument on this score avoids recognition of the fact that in

the *Fair Lawn* case we held the Sunday Law only unenforceable in a criminal sense for the violation there charged because of its lack of expression of a penalty. This decision was never intended to strip the statute of its effectiveness in prohibiting Sunday operations that are not works of charity or necessity. On the contrary, while that statute, N. J. S. 2A:171-1, was incapable of furnishing a basis for the prosecution of violations such as that charged in the *Fair Lawn* case, it remains declarative of the general public policy of the state with respect to Sunday closing. Moreover, the present statute, L. 1955, c. 254, furnishes, at least with respect to car dealers, what N. J. S. 2A:171-1 lacked to make it effective in the *Fair Lawn* case—a penalty provision.

The public policy of this state is against all worldly employment on Sunday, except works of charity and necessity, N. J. S. 2A:171-1. The means selected for accomplishing and maintaining that policy is not for us to question as long as there is any reasonable basis for the enactment, *Amodio* v. *Board of Commissioners of West New York*, *supra*, 133 N. J. L. 220 (Sup. Ct. 1945); see also the following statutes prohibiting Sunday activity: R. S. 45:4-26—barbering; R. S. 45:22-31—pawnbrokering; R. S. 23:4-24—hunting; R. S. 50:2-11 and 50:3-15—taking of clams and oysters; N. J. S. A. 23:5-24.4—fishing with nets; N. J. S. A. 5:5-38 and 5:5-47—horseracing; N. J. S. A. 5:8-31 and 5:8-58—bingo games and raffles; and N. J. S. 2A:171-3—service of process.

The judgments below are reversed and the complaints are dismissed.

Appendix A-2.

Opinion of Superior Court.

SUPERIOR COURT OF NEW JERSEY,

LAW DIVISION, MONMOUTH COUNTY.

(DOCKET NO. L-4423-55 P. W.)

GUNDAKER CENTRAL MOTORS, INC., a body corporate of the State of New Jersey,

Plaintiff,

vs.

FREDERICK J. GASSERT, JR., Director of Division of Motor Vehicles of the State of New Jersey, and BOROUGH OF BELMAR, a municipal corporation of the County of Monmouth,

Defendants.

Civil Action.

Opinion.

WARD KREMER, Esquire, Attorney for Plaintiff.

GROVER C. RICHMAN, JR., Esquire, Attorney General (BRENDAN T. BYRNE, Esquire, Deputy Attorney General, appearing), Attorney for Defendant Gassert.

HAROLD FEINBERG, Esquire, Attorney for Defendant Borough.

EWART, J. S. C.:

By this suit in lieu of the former prerogative writ of certiorari, plaintiff attacks the constitutionality of C. 254, L. 1955, approved December 28, 1955 and effective imme-

diately. Final hearing was had on May 29, 1956, at the conclusion of which the matter was decided by a brief oral opinion in favor of plaintiff. Formal judgment was entered June 2, 1956 and notice of appeal by defendant Gassert has been served. This opinion is filed pursuant to the provisions of R. R. 1:2-8 (h).

There is little or no factual dispute in this case. From the stipulations, admissions, and proofs adduced at the final hearing, I find the facts essential to a determination of this controversy to be as follows:

For many years past and at the present time, plaintiff corporation has owned and operated an automobile sales agency in the Borough of Belmar, Monmouth County, holding a franchise for the sale of Plymouth and DeSoto automobiles. It is engaged in the business of selling both new and second-hand automobiles. Plaintiff has a substantial investment in its business; it has made a practice of keeping open and doing business on Sundays for many years past up until January of 1956; but after the enactment of C. 254, L. 1955, and upon receipt of notice from the police authorities of the Borough of Belmar, its business has been closed entirely on each Sunday commencing early in January 1956 and continuing to the date of the final hearing on May 29, 1956. Prior to the enactment of said statute, Sunday was one of plaintiff's largest business days, it customarily selling more cars on Sunday than any other day of the week.

Not only in Belmar where plaintiff's place of business is located, but also in other municipalities generally within the shore area in the Counties of Monmouth and Ocean, many business and commercial establishments have for years kept open for business on Sunday and have operated freely and without interference from local or State authorities. Because of the large influx of transients to those areas over weekends, particularly during the summer season, Sunday has come to be one of the busiest days of the week. The uncontradicted proofs disclose that among

the businesses so carried on and operated freely on Sundays are gasoline service stations selling not only gasoline and oil but also tires, automobile accessories and outboard motors, hardware stores, 5 and 10¢ stores, boat yards at which marine equipment and supplies and boats of all kinds and descriptions are displayed, rented and sold, real estate offices offering properties for rent and for sale, newspaper and stationery stores, restaurants, moving picture theatres, merry-go-rounds, games and amusements of various kinds designed to offer entertainment and recreation to the public, stores selling antiques, sporting goods stores offering fishing tackle, guns and ammunition, camera shops, stores offering lawn mowers, garden tools and general hardware supplies, lumber yards, and stores offering for sale merchandise of almost every description. Among the examples cited in the proofs are Hotaling's Boat Yard on Highway Route 9 in the Borough of South Toms River which keeps open regularly on Sundays and displays and offers for sale boats of all kinds and descriptions, both power and sail, as well as a full line of marine supplies and equipment, while diagonally across the street, distant about 200 yards from the Boat Yard, is located Toms River Motor Company, referred to in the proofs as operated by one Keough, selling Plymouth and Dodge automobiles, but which place of business has been compelled to close on Sundays since the enactment of C. 254, L. 1955. Another example cited in the proofs is a motor boat agency selling Chris-Craft boats, located on the highway at the Collingswood Circle, a few miles out of Belmar in Monmouth County, and which operates freely on Sundays, while the Daly Ford Automobile Agency immediately adjoining the boat agency has been compelled to close on Sundays since the enactment of said statute.

Most of the automobile agencies selling new and second-hand automobiles in the State of New Jersey are members of the New Jersey State Automotive Trade Association. The Association has approximately 900 members and there

are approximately 200 dealers in the State who are not members of the Association. In the latter part of October 1954, the Association caused a poll to be taken among its members on the subject of Sunday closing of automobile sales agencies. Questionnaires were sent out by Mr. Otto P. Heneberger, business manager of the Association, and answers were received from 80.3% of the members. 77.4% of those who answered the questionnaires were in favor of closing on Sundays. Thereupon, the Association had its counsel, Mr. James E. Fagan of Newark, N. J., draft a bill providing for closing of automobile sales agencies on Sunday and, with the support of the Trade Association, that bill was enacted into law, becoming C. 254, L. 1955.

Joseph A. Byrnes, a Lincoln-Mercury dealer at Hackensack; Gerald C. Kleinhanz, a Buick dealer at Woodbury; and George Downs, a Pontiac dealer in Matawan, all members of said Association, testified in substance that prior to the enactment of said statute and because of competitive conditions, they were compelled to keep their agencies open for business on Sundays. Mr. Byrnes kept open for business on Sundays for a period of about 4 months prior to enactment of the statute. Mr. Kleinhanz kept his agency open on Sundays prior to 1942; he was closed on Sundays during the period from 1942 to 1948; and his agency was open for business on Sundays from 1948 until the enactment of said statute.

Mr. William C. Brennan, Chief of the Certificate of Ownership Section in the Motor Vehicle Division, testified that he is in charge of the licensing of automobile dealers in this State under the provisions of the law; that he has two field men employed; that his office is closed on Sundays and that his men do not work on Sundays.

With this factual background, I turn to consideration of the statute under attack and to the reasons advanced, *pro* and *con*, for its validity or invalidity.

Appendix A-2.

I.

The Statute.

C. 254, L. 1955, is a penal statute declaring anyone who shall carry on the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles, or who shall open any place of business or lot wherein he attempts to or does engage in such business on a Sunday, to be a disorderly person, subject, upon conviction, to fine or imprisonment, either or both. By the title of the act it purports to be a supplement to C. 171, Title 2A, of the New Jersey Statutes. The statement annexed to the bill upon its introduction reads:

> "The purpose of this bill is to provide for a more effective observance of Sabbath days, and to make uniform the closing of the place of business of all new and used car dealers on the Sabbath and to provide penalties for violations of the same."

The uncontroverted proofs in this case disclose that the idea for the statute under attack had its origin in the New Jersey State Automotive Trade Association; that its primary purpose was to control competitition on Sundays, particularly from automobile dealers along the shore area in the State; that the bill, which was afterwards enacted into law, was drawn and prepared by the attorney for the New Jersey State Automotive Trade Association; and that the members of that Association sponsored and supported enactment of the measure into law.

II.

Constitutional Guaranties.

Paragraph 1 of Article 1 of the 1947 New Jersey Constitution describes as a natural and unalienable right the acquisition, possession and protection of property, and

paragraph 5 of the same Article provides that no person shall be denied the enjoyment of any civil right, nor be discriminated against in the exercise of any civil right.

The 14th Amendment to the Federal Constitution forbids any State to deprive any person of property without due process of law and forbids any State to deny to any person the equal protection of the laws.

III.

Presumption in Favor of the Validity of a Statute.

It is a well established rule of law that the courts are required to presume that a statute enacted by the Legislature is within the constitutional power of that branch of the government and that a statute duly enacted by the Legislature will not be adjudged to be unconstitutional unless and until its repugnancy to the Constitution is so apparent as to leave no room for reasonable doubt. *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, 457 (Ch. 1943); *Reingold* v. *Harper*, 6 N. J. 182, 194 (1951); *Behnke* v. *N. J. Highway Authority*, 25 N. J. Super. 149, 170 (Ch. Div. 1953), affirmed 13 N. J. 14, 25 (1953); *Magierowski* v. *Buckley*, 39 N. J. Super. 534, 556 (App. Div. 1956); *Fifth Street Pier Corp.* v. *City of Hoboken*, 40 N. J. Super. 12, 18 (App. Div. 1956).

However, while the courts properly are reluctant to set aside a duly enacted statute as being violative of constitutional guaranties, nevertheless it is the clear and imperative duty of the court to condemn that which clearly contravenes the provisions of the Constitution. *Wilentz* v. *Hendrickson*, *supra*, at 457.

And the court is charged with the duty of seeing to it that the efficiency of constitutional guaranties shall not be whittled away or eroded by unwarranted presumptions. Otherwise, constitutional guaranties protecting individual rights and rights of property may become a mere rope of

sand in no wise restraining state action. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 154, 17 S. Ct. 255 (1897); *Washington National Ins. Co.* v. *Board of Review, etc.*, 1 N. J. 545, 554 (1949).

IV.

The Police Power and Its Limitations.

Defendant contends that the statute under attack in this suit constitutes a valid exercise of Police Power inherent in the state.

While it is difficult to define with precision the term "Police Power", it has been defined generally as the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, not repugnant to the Constitution, as shall be deemed to be for the good and welfare of the Commonwealth and the people. Judge Cooley has said that the Police Power of the State embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others. By means of the Police Power, the legislature exercises a supervision over matters involving the common welfare. 11 *Am. Jur.*, pp. 972-973.

The Police Power extends to all the great public needs and may be used in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare. *N. J. Good Humor, Inc.* v. *Bradley Beach*, 124 N. J. L. 162, 168-169 (E. & A. 1939). It comprehends measures essential to the protection of the public health,

safety, and welfare. *Reingold* v. *Harper*, 6 N. J. 182, 190 (1951).

The Police Power is an attribute of sovereignty and is inherent in every sovereign government. 11 *Am. Jur.* pp. 966-967; *Reingold* v. *Harper, supra,* at p. 194.

But broad as is the Police Power, it is not without its limitations. Its exercise must be directed to a legitimate end, *i.e.*, the protection of a basic interest of society rather than the advantage of particular individuals. *Home B. & L. Assoc.* v. *Blaisdell*, 290 U. S. 398 (1934); *N. J. Good Humor, Inc.* v. *Bradley Beach, supra,* at p. 168; *Reingold* v. *Harper, supra,* at p. 192. It may not be exerted to serve private interests in contravention of common rights. *N. J. Good Humor, Inc.* v. *Bradley Beach, supra,* at p. 192.

To justify the exercise of the Police Power, it is requisite that the common welfare be advantaged to a substantial degree. *N. J. Good Humor, Inc.* v. *Bradley Beach, supra,* at p. 168.

Regulation of occupations cannot be valid where it amounts to an arbitrary or unwarranted interference with the right of the citizen to pursue a lawful business. A valid exercise of the Police Power is dependent upon a reasonable necessity for its exercise to protect the health, safety, morals, or general welfare of the state and its citizens. 11 *Am. Jur.*, pp. 1047-1048. And it is not within the bounds of reason to prohibit particular classes of business, lawful in themselves, for the enrichment or protection of another class. Subversion of competition is not in the public interest and the Police Power cannot lawfully be addressed to that end. *N. J. Good Humor* v. *Bradley Beach, supra,* at p. 168. To justify the imposition upon private business of regulations under the Police Power, it is requisite that the public have a definite interest in the use calling for public regulation to serve that interest. One's business is not clothed with a public interest unless it bears a substantial and definite relation to the public interest. *Reingold* v.

Harper, supra, at p. 191. And regulations under the Police Power may not go beyond the demands of the public interest which vindicates its exercise. *Idem.* An exercise by the State of Police Power affecting personal and property rights is nugatory unless made in good faith for the attainment of a public object. If the dominant purpose be the service of private interests under the cloak of the general public good, it constitutes a perversion and abuse of power and is unlawful. *N. J. Good Humor, Inc.* v. *Bradley Beach, supra,* at p. 169; *Reingold* v. *Harper, supra,* at p. 192.

Our Supreme Court has said that to constitute a valid exercise of the Police Power, there must be a substantial relation between the regulation and the protection of the common welfare in an area of action within the reach of the Police Power; that the means adopted must be reasonable and appropriate to that end; and that the Power may not be invoked for the economic protection alone of particular individuals or groups of individuals. *Reingold* v. *Harper, supra,* at p. 192.

Another important limitation upon exercise of the Police Power by the legislature is to be found in the due process and equal protection clauses of both our State Constitution and the Federal Constitution. 1947 *Constitution, pars.* 1, 5 of *Art.* I; 14th *Amendment to Federal Constitution.* Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or to considerations of policy. *Washington Nat. Ins. Co.* v. *Board of Review, etc.,* 1 N. J. 545 at 553, 554 (1949). Those constitutional guaranties mean that the rights of all persons must rest on the same rules under similar circumstances. *Idem.*

While the State has a broad discretion in selection of the class to which a statute is to be applicable, yet the classification must have a reasonable and just relation

either to the general object of the legislation or to some substantial consideration of public policy or convenience or the service of the general welfare. Otherwise, there will be arbitrary discrimination, and if there be unreasonable or illusory classification, then the classification is arbitrary, discriminatory and unconstitutional. *Idem; VanRiper* v. *Parsons,* 40 N. J. L. 1 (Sup. Ct. 1878); *Hart* v. *Teaneck,* 135 N. J. L. 174 (E. & A. 1946).

If a statute allows one class to engage in what is presumptively a legitimate business while denying such right to others, to be valid it must be based upon some principle which may reasonably promote the public health, safety, or welfare. 11 *Am. Jur.* pp. 1046-1047.

Classification of objects of legislation to have the virtue of constitutional generality must rest upon distinctions that are substantial and not merely illusory. The test is whether the statutory class has a logical and reasonable basis, free from artificiality and arbitrariness, embracing all and omitting none naturally falling into that category. *Raymond* v. *Teaneck,* 118 N. J. L. 109 (E. & A. 1936); *DeMonaco* v. *Renton,* 18 N. J. 352 (1955).

A statute which discriminates without proper basis therefor cannot be sustained under the Police Power. *In re. Van Horne,* 74 N. J. Eq. 600 (Ch. 1908).

V.

Present Status of Sunday Observance Law in This State.

Defendant contends that C. 254, L. 1955, constitutes a valid exercise of the State's Police Power and is not discriminatory because the State statutes, independent of C. 254, L. 1955, still prohibit the transaction of secular business on Sundays, and cites in support thereof: *Sherman* v. *Paterson,* 82 N. J. L. 345 (Sup. Ct. 1912); *Schumacher* v. *Little Falls,* 92 N. J. L. 106 (Sup. Ct. 1918); *Mazzarelli* v. *City of Elizabeth,* 11 N. J. Misc. 150 (Sup. Ct. 1933); and

Appendix A-2.

City of Elizabeth v. *Windsor-Fifth Avenue, Inc., et al.*, 31 N. J. Super. 187 (App. Div. 1954).

In *State* v. *Fair Lawn Service Center, Inc.*, 20 N. J. 468 (1956), our Supreme Court reversed a judgment of conviction against the defendant for violation of the Sunday Observance Law (NJS 2A:171-1) on the ground that it was a criminal statute which provided no penalty and that "a criminal statute without a penalty clause is of no force and effect". I conclude that presently we have in this State no effective law prohibiting the carrying on of general business on the Sabbath. But defendant contends that notwithstanding the decision in *State* v. *Fair Lawn Service Center, Inc., supra*, the statute, NJS 2A:171-1, has not been voided even though one may not be convicted and punished for its violation, and that it is still a valid statute prohibiting the transaction of secular business on the Sabbath. How a statute which is "of no force and effect" can still be law is not clear to me and I cannot concede the soundness of defendant's contention in that respect.

Sherman v. *Paterson, supra; Schumacher* v. *Little Falls, supra;* and *Mazzarelli* v. *City of Elizabeth, supra*, were all decided prior to the enactment of NJS 2A:171-1 and while the old Sunday closing laws (R. S. 2:207-1) were in full force and effect, and were decided prior to the pronouncement of the Supreme Court in *State* v. *Fair Lawn Service Center, Inc.* All three of those cases were bottomed upon the proposition that the old Sunday closing laws prohibited all worldly employment and business on the Sabbath and that an ordinance prohibiting the operation of a particular line of business on the Sabbath could not be said to constitute discriminatory class legislation because in any event all such Sunday business was prohibited by the State statute then in force. Since the enactment of NJS 2A:171-1 and the pronouncement of the Supreme Court in *State* v. *Fair Lawn Service Center, Inc., supra*, that basis no longer exists.

City of Elizabeth v. *Windsor-Fifth Avenue, Inc., supra,* was likewise decided prior to the decision in *State* v. *Fair Lawn Service Center, Inc.* and is distinguishable from the case at bar in that the court there found, unlike the situation here, that there were no proofs sufficient to overcome the presumption of validity in favor of the ordinance there under attack.

Even if defendant's contention that the statute, NJS 2A:171-1, still has some force and virtue, notwithstanding the decision in *State* v. *Fair Lawn Service Center, Inc.,* be correct (which I cannot concede), nevertheless, singling out those engaged in the sale of automobiles as the only class subject to an effective statute (C. 254, L. 1955) carrying real penalties still constitutes unlawful class discrimination because I think there is no sound basis for placing automobile sales agencies in a separate classification by themselves. I regard such attempted classification as entirely unreasonable and illusory.

CONCLUSIONS.

Based upon the proofs in this case, I am of the opinion that C. 254, L. 1955, was not enacted to protect a basic interest of society such as the general health, safety, morals or welfare of the people, but rather that it had an economic base and was born of an unholy alliance between the New Jersey State Automotive Trade Association, which acted as its Godfather, and the Legislature, and had as its predominant purpose a measure of control of competition in the sale of new and second-hand automobiles in this State. As such, it constitutes a perversion of the Police Power and violates both the State and Federal Constitutions.

Furthermore, there is no sound or logical reason to single out automobile sales agencies from among the dozens of businesses operating freely on Sunday in this State for regulation while imposing no similar regulations or restrictions upon such other business operations in the same geo-

graphical area. I know of nothing connected with the keeping open of automobile sales rooms or lots, or the exhibition and sale of automobiles, that may fairly and reasonably be said to constitute a danger or hazard to the public health, morals, safety or welfare, so as to justify placing such business in a separate classification subject to regulations ostensibly under the Police Power while permitting other merchandising concerns to operate freely on Sunday in the same area. Such classification would be illogical, unreasonable, illusory and denies to plaintiff and to other automobile dealers similarly situated the equal protection of the laws guaranteed by both the State and Federal Constitutions.

Nor can it be said that the exhibition and sale of automobiles bears such a substantial or definite relation to the public interest as to justify the imposition under the Police Power of special regulations applicable to that business only.

A realistic approach by the Legislature to the problem of permitting or prohibiting the general conduct of business in this State on the Sabbath would seem to call for the enactment of general legislation, applicable to businesses in general. Such general act would avoid the vice of unreasonable and illusory classification and the charge of unequal treatment under the law. I am not saying that such a general act prohibiting the transaction of all secular business on the Sabbath would not be a valid exercise of the Police Power. Certainly it is common knowledge, of which I think this Court may take judicial notice, that for many years past business in general has been carried on freely in this State on Sundays, particularly in the resort areas along the coast, without a substantial degree of interference from either local or State authorities. There is no doubt, in view of conditions presently existing and which have existed for many years past, that the enactment and enforcement of such a general law prohibiting the transaction of secular business on the Sabbath would have a tremendous impact upon the citizens of this State. How-

ever, whether such a general law should be enacted, and enforced, is a problem for the Legislature and not for the Court.

For the reasons given above, I have concluded that the statute under attack in this suit cannot be sustained and must be set aside as an unconstitutional invasion of personal and property rights.

Appendix A-3.

MANDATE ON REVERSAL.

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET No. 2216

GUNDAKER CENTRAL MOTORS, INC.,
Plaintiff-Respondent,

vs.

FREDERICK J. GASSERT, JR., Director, &c.,
Defendant-Appellant,

and

BOROUGH OF BELMAR, etc.,
Defendant,

Civil Action On Appeal.

JEROME D. HABER, trading, etc., *et al.*,
Plaintiffs-Respondents,

vs.

FREDERICK J. GASSERT, JR., ind., etc.,
Defendant-Appellant,

and

ANGELO DEROSA, etc., *et als.*,
Defendants.

Mandate on Reversal.

This cause having been duly argued before this Court by Mr. John F. Crane, counsel for the appellant and Mr. Albert S. Gross, counsel for the respondents, Haber and Slaman and Mr. Ward Kremer, counsel for the respondent, Gundaker Central Motors, Inc. and the Court having considered the same,

It is hereupon ordered and adjudged that the judgments of the said Superior Court—Law and Chancery Divisions

are in all things reversed, set aside and for nothing holden, with costs;

and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Law and Chancery Divisions to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton the 17th day of December, 1956.

Filed, Dec. 17, 1956.

JOHN H. GILDEA,
Clerk.

JOHN H. GILDEA,
Clerk of the Supreme Court.

Appendix B-1.

CHAPTER 254

An Act concerning the observance of the first day of the week commonly known as Sunday, and providing penalties for engaging in the business of buying, selling and trading motor vehicles on Sunday, and supplementing chapter 171 of Title 2A of the New Jersey Statutes.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Any person who shall carry on or engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles; or who shall open any place of business or lot wherein he attempts to or does engage in the business of buying, selling, exchanging, dealing or trading in new or used motor vehicles; or who does buy, sell, exchange, deal or trade in new or used motor vehicles as a business on the first day of the week, commonly known and designated as Sunday is a disorderly person. Such a disorderly person upon conviction for the first offense shall pay a fine not to exceed $100.00 or be imprisoned for a period of not more than 10 days or both; and for the second offense shall pay a fine not to exceed $500.00 or be imprisoned for a period not more than 30 days or both; and for the third or each subsequent offense shall pay a fine of $750.00 or be imprisoned for a period of 6 months or both. If the person is a licensed dealer in new or used motor vehicles in this State, under the provisions of chapter 10, Title 39 of the Revised Statutes, such person shall also be subject to suspension or revocation of his dealer's license to engage in the business of buying, selling or dealing in motor vehicles in this State as provided in Title 39, chapter 10, section 20, for violation of this statute.

Appendix B-1.

2. The following definitions shall apply for the words or terms used in this act unless other meaning is clearly apparent from the language or context:

"Motor vehicles" means and includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks.

"New motor vehicle" means only newly manufactured motor vehicles and includes but is not limited to motorcycles, trailers, trucks, passenger cars and tractors.

"Used motor vehicle" means every motor vehicle, title to, or possession of, which has been transferred from the person who first acquired it from the manufacturer or dealer and has been so used as to become or is commonly known as secondhand within the ordinary meaning thereof, and includes every motor vehicle other than a new motor vehicle, including but not limited to motorcycles, trailers, tractors, trucks and passenger cars.

"Person" includes natural persons, firms, partnerships, corporations, associations or other artificial bodies, trustees, receiver and officers, employees, agents, and others acting for or on behalf of any person.

3. This act shall take effect immediately.

Approved and effective Dec. 28, 1955.

Appendix B-2.

Chapter 253

An Act concerning the suspension or revocation of new and used motor vehicle dealers' license, amending Chapter 10 of Title 39 of the Revised Statutes.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 39:10-20 of the Revised Statutes is amended to read as follows:

39:10-20. The director may suspend for a period less than the unexpired term of a license or revoke a license, after hearing, for a violation of any provision of this chapter or upon the final conviction of the licensee of a crime, arising out of fraud or misrepresentation in the sale or financing of a motor vehicle, or upon proof of the failure of a licensee to make payment of the amount of any final judgment, rendered by a court of competent jurisdiction against such licensee and founded upon a claim arising out of fraud or misrepresentation in the sale of a motor vehicle, within 90 days after the same is finally entered, or for final conviction of the licensee for violating any provision of chapter 171 of Title 2A or of any supplement thereof (Observance of Sabbath Days). The clerk of the court in which any conviction is rendered, or the court where it has no clerk, shall forward to the director, immediately upon the entry thereof, a certified copy of the conviction or a transcript thereof. The clerk of the court in which any judgment founded upon fraud or misrepresentation is rendered, or the court where it has no clerk, shall forward to the director, immediately after the expiration of the 90 days, a certified copy of the judgment, or a transcript thereof, showing it to have been unsatisfied more than 90 days after it became final. The director shall, before suspending or revoking the license, and at least

days prior to the date set for the hearing, notify the lder of the license, in writing, of any charges made, and all afford him an opportunity to be heard in person or counsel. The written notice may be served either rsonally or by registered mail addressed to the last-own address of the licensee. The director may subpoena d bring before him any person in this State, or take stimony by deposition, in the same manner as prescribed law in judicial proceedings in the courts of this State, d shall also issue and deliver to the dealer such subpoenas are requested by him. The Appellate Division of the perior Court shall have power to review, by an appeal lieu of prerogative writ taken by an aggrieved person, final determination of the director.

2. This act shall take effect immediately.

Approved and effective Dec. 28, 1955.

In the

Supreme Court of the United States

No. 934

GUNDAKER CENTRAL MOTORS, INC.,
a body corporate of the State of New Jersey,

Appellant,

v.

FREDERICK J. GASSERT, JR., Director of Division of
Motor Vehicles of the State of New Jersey,

Appellee,

and

BOROUGH OF BELMAR, a municipal corporation of the
County of Monmouth,

Defendant.

On Appeal from the Supreme Court
of the State of New Jersey

MOTION TO DISMISS

GROVER C. RICHMAN, JR.,
Attorney General of New Jersey,
Attorney for Appellee, Frederick
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JOSEPH E. CHASE,
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Motion to Dismiss

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the within appeal be dismissed on the ground that the question presented is so lacking in substance as not to warrant further argument.

Statement

This is an appeal from the final judgment of the Supreme Court of New Jersey entered on December 17, 1956 in which the validity, under the equal protection and due process clauses of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New Jersey, of Chapters 253 and 254 of the Public Laws of 1955 of the State of New Jersey was upheld. *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956). The statutes are set forth in appellant's appendix B1 and B2 appearing at pages 44 to 47 of appellant's jurisdictional statement.

Briefly stated, Chapter 253 amended R.S. 39:10-20 by adding to the grounds upon which suspension or revocation of an automobile dealer's license could be based "conviction of the licensee for violating any of the provisions of Chapter 171 of Title 2A or of any supplement thereof (Observance of Sabbath Days)." Chapter 254, N.J.S. 2A: 171-1.1, a supplement to Title 2A of the New Jersey Statutes, declared that any person who shall engage in the business of buying or selling motor vehicles or who opens any place of business where he attempts to or does engage in the business of buying or selling motor vehicles on Sunday shall be a disorderly person and subject to fine or imprisonment or both.

The case was one of two which had been consolidated on appeal and which had been argued and determined together. The plaintiffs in the other case have not appealed.

After the Supreme Court of New Jersey rendered its opinion appellant moved for a stay before the Supreme Court of New Jersey pending its appeal to the Supreme Court of the United States. The Supreme Court of New Jersey on February 4, 1957 denied the motion for a stay.

The appellant also applied for a stay of the judgment of the Supreme Court of New Jersey to the Honorable WILLIAM J. BRENNAN, JR., Justice of the Supreme Court of the United States. On April 18, 1957 Justice BRENNAN denied the application for a stay.

ARGUMENT

The decision of the Supreme Court of New Jersey is manifestly correct. In answering the argument that automobile dealers were discriminated against the Court pointed out at 23 N. J. 81 that:

> "The statutes in question here apply to all automobile dealers within the State, without distinction as to class, type, location or otherwise. All are required to close. Fundamentally then, they satisfy the initial inquiry as to equal protection. No economic advantage can be gained by any one within this State by reason of the Sunday regulation because no persons other than those covered by the enactments can engage in the business of selling motor vehicles, R.S. 39:10-19. Thus, all motor vehicle dealers are protected in their businesses and no substantial loss of revenues can result where the product they deal in is unobtainable elsewhere within the State. The cars that would be sold on Sunday will now be sold on the other days in the week and probably to the same prospective purchasers."

The Court then went on to say that there was a reasonable basis for the statute in that it protected the public

from the inimical effects of increased accident hazards on the highways on Sundays. Another reasonable basis for the statute was recognized by the Court as the desire to protect employees engaged in the automobile business from unusually long hours of labor.

The decision of the Supreme Court of New Jersey is consistent with the opinions of the Supreme Court of the United States in the field of regulation of Sunday activity.

In *Richardson et al.* v. *Goddard et al.*, 23 How. 28, 64 U. S. 28, 16 L. Ed. 412 (1859) the early history of the observance of Sunday as a Sabbath or day of ceremonial rest was reviewed as related to a policy of alleviating the hardships of laborers. The validity of the Massachusetts statute forbidding the pursuit of worldly business on Sunday was assumed. At the same term the validity of a Sunday statute of Maryland was similarly assumed in *Phila., Wil., and Balt. R. Co.* v. *Phil. and Havre de Grace Steam Towboat Co.*, 23 How. 209, 64 U. S. 209, 16 L. Ed. 433 (1859).

The case of *Brunswick-Balke-Collender Co.* v. *Evans*, 248 U. S. 587, 39 S. Ct. 5, 63 L. Ed. 434 (1918) illustrates the reluctance of the United States Supreme Court to undertake review of state statutes regulating Sunday activities. The District Court below had before it a statute of Oregon prohibiting keeping open any store, shop etc. for the purpose of labor or traffic on Sunday but excepting from its provisions drug stores, doctor shops, undertakers, livery stable keepers, butchers and bakers. An attack was made upon the statute on the ground it violated the 14th Amendment of the United States Constitution in the matter of classificaion. The District Court held the statute to be valid, *Brunswick-Balke-Collender Co.* v. *Evans*, 228 F. 991 (D. C. D. Ore. 1916), and the subsequent appeal was dismissed by the Supreme Court without opinion, 248 U. S. 587, *supra*.

The case most nearly in point is *Petit* v. *State of Minnesota,* 177 U. S. 164, 20 S. Ct. 666, 44 L. Ed. 716 (1900) which concerned the constitutional validity of a statute prohibiting all labor on Sunday except works of necessity or charity. The statute further provided that keeping open a barber shop shall not be deemed a work of necessity or charity. The court stated that it had uniformly upheld state laws relating to the observance of Sunday as a legitimate exercise of the police power of the state. The argument that the proviso, being restricted to a single class of tradesman, rendered the statute unconstitutional was rejected. The court commented at 20 S. Ct. 668 as follows:

> "We recognize the force of the distinctions suggested and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the states in these matters, by holding that the classification was so palpably arbitrary as to bring the law into conflict with the Federal Constitution."

Hennington v. *Georgia,* 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166 (1896) also held that Sunday laws are a legitimate exercise of state police power.

The foregoing cases demonstrate that the Supreme Court of the United States has consistently upheld the constitutional validity of state statutes regulating Sunday activities as a legitimate exercise of state police power. In particular, the argument that a statute is invalid because it applies only to a particular trade or business has been set at rest by the case of *Petit* v. *Minnesota, supra.* The case at bar is governed by the same principle.

The complaint of the appellants as to the supposed economic effect upon their business is one for which there is no judicial remedy. The matter is one which lies within

the area of political discretion of a state. As was said in *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955), at 348 U. S. 488:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought • • •. We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U. S. 113, 134, 24 L. Ed. 77, 'for protection against abuses by legislatures the people must resort to the polls, not to the courts.' "

It is respectfully submitted, therefore, that the appellants have presented no substantial federal question for the decision of this Court and that the appeal should be dismissed.

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JOHN F. CRANE,
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Of Counsel.

No. 934. GUNDAKER CENTRAL MOTORS, INC., *v.* GASSERT, DIRECTOR, DIVISION OF MOTOR VEHICLES OF NEW JERSEY, ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. *Ward Kremer* for appellant. *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *John F. Crane*, Deputy Attorney General, for Gassert, appellee. Reported below: 23 N. J. 71, 127 A. 2d 566.